

**IN THE COURT OF APPEALS,  
DIVISION ONE  
STATE OF ARIZONA**

STATE OF ARIZONA, through WILLIAM )	)	
MONTGOMERY, Maricopa County )	)	Court of Appeals, Division One
Attorney, )	)	_____
	)	
Petitioner, )	)	Maricopa County Superior Court No.
	)	CR2009-171757-001 DT
vs. )	)	
	)	
THE HONORABLE CHRISTOPHER )	)	
WHITTEN, Judge of the Superior Court of )	)	
the State of Arizona, in and for the County )	)	
of Maricopa, )	)	
	)	
Respondent Judge, )	)	
	)	
	)	
RICKY BRETT KEAHY MARTINEZ and )	)	
DISTRICT MEDICAL GROUP, )	)	
Real Parties in Interest. )	)	

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**AMICUS CURIAE BRIEF OF  
THE ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL  
IN SUPPORT OF PETITIONER, STATE OF ARIZONA**

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## **I. INTRODUCTION**

The Arizona Prosecuting Attorneys' Advisory Council (APAAC) represents more than 800 state, county, and municipal prosecutors. APAAC's primary mission is to provide training to Arizona's prosecutors. APAAC also provides a variety of other services to and on behalf of prosecutors. For instance, APAAC acts as a liaison for prosecutors with the legislature and the courts. In this role, APAAC may advocate prosecutorial interests before the legislature or proposes changes to this Court's procedural rules. On occasion, APAAC submits amicus curiae briefs in state or federal appellate courts on issues of significant concern. This is one of those occasions.

Many of the prosecutors APAAC represents try criminal cases in which physician witnesses testify about their actions during the course of treatment of a victim or witness. Typically, those doctors have been considered fact witnesses, even though a portion of their testimony may include information in which the doctor used knowledge obtained in the course of professional training, experience or education. The trial court's decision requiring the compensation of these fact witnesses as expert witnesses will require a wholesale shift in the way in which prosecutors present their cases at trial and work with witnesses performing a basic civic duty. No published appellate decision has previously permitted a trial court to order witness compensation in this manner. For those reasons, APAAC joins with

the Petitioner in asking this Court to accept jurisdiction of the pending special-action petition to resolve this matter of statewide importance.

## **II. ARGUMENT**

### **A. No constitutional or statutory authority exists to permit a trial court to compensate a fact witness in a criminal trial.**

#### **1. Witness compensation is a matter of legislative grace.**

As a general rule, “the right of a witness to compensation is purely statutory since at common law no witness fees were paid.” 98 C.J.S. Witnesses § 70 (2002). In a criminal action, liability for fees of witnesses called by the state is based on constitutional or statutory provisions and limited thereby. *Id.* at § 72. “In the absence of such provisions, the liability does not exist.” *Id.*

Neither the United States Constitution nor the Arizona Constitution requires compensation of trial witnesses. The United States Supreme Court rejected the argument that fact witnesses are entitled to compensation for testifying at trial under the United States Constitution. In *Hurtado v. United States*, 410 U.S. 578 (1973), a group of illegal aliens, who were incarcerated as material witnesses in the criminal trial of their smugglers, argued that they were entitled to compensation for the time spent in custody. In rejecting the petitioners’ Fifth and Thirteenth Amendment argument that the dollar-a-day statutory compensation amounted to an unconstitutional taking, the Court held that “there is a public obligation to provide evidence and that this obligation persists no matter how financially burdensome it

may be.” *Id.* at 589 (internal citations omitted). The Supreme Court recognized that witness compensation is purely a matter of legislative grace.

‘(I)t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public .’

*Id.*, citing *Blair v. United States*, 250 U.S. 273, 281 (1919) (emphasis added). The Arizona Supreme Court also rejected the argument that disallowance of expert witness fees constituted an unconstitutional taking in a case interpreting the Arizona Constitution. *State v. McDonald*, 88 Ariz. 1, 13-14, 352 P.2d 343, 351 (1960).

**2. The court has no inherent authority to order witness compensation absent statutory authority.**

Arizona courts agree that a court’s authority in this area is limited to authorizing statutes. In a different dispute over the court’s power to regulate witnesses, this Court rejected the argument that a trial court has broad and inherent authority to regulate trial witnesses absent explicit statutory authority. See *Armstrong v. Hooker*, 135 Ariz. 358, 359, 661 P.2d 208, 209 (App. 1982) (court does not have inherent authority to require attendance of out-of-state witness in the

absence of an authorizing statute). Therefore, a criminal trial witness is only entitled to compensation when explicitly permitted by statute.

**3. A.R.S. § 13-4077 does not permit compensation for treating physicians absent a showing of indigency or out-of-county residency.**

No statutory authority exists to permit the trial court to order compensation of the victim's treating physicians as if they were retained expert witnesses. A.R.S. § 13-4077 is the only statute that provides compensation for witnesses in a criminal prosecution. Under this statute, compensation is limited to travel expenses for witnesses who are indigent or reside out of the county where the trial is held.<sup>1</sup>

According to the statute's historical notes, § 13-4077 was originally enacted in 1956 and was based on California Penal Code § 1329. A.R.S. § 13-4077 (West Supp. 2011). The original version of the California statute also limited the availability of witness fees to out-of-county or indigent witnesses. Cal. Penal Code § 1329 (West Supp. 2011). However, California amended § 1329 in 1937 to remove the limitation and make witness fees available to any witness in a criminal trial at the court's discretion. *Id.* Accordingly, the fact that the Arizona legislature chose not to adopt the broader version of the California statute when it enacted § 13-4077 in 1956 indicates an intent to limit the class of persons to whom

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<sup>1</sup> The doctors do not argue, and nothing in the record suggests, they are indigent or reside outside of Maricopa County. Rather, they argue that performing their civic



compensation is available. The trial court's decision ordering payment to the victim's treating physicians ignores the plain language of § 13-4077 and erroneously rewrites the statute in a manner rejected by the state legislature.

**B. The trial court erroneously treated the doctors as expert witnesses.**

**1. The trial court and doctors' reliance on A.R.S. § 13-4013 contradicts the statute's plain language.**

The doctors claim that they should be treated as retained expert witnesses for compensation purposes whenever any part of their testimony may require specialized knowledge obtained within the course of their professional education or work. DMG's Motion for Protective Order at 6. Their argument erroneously presumes that expert witnesses are treated in criminal prosecutions the way they are in civil matters. However, Title 13 has no statute permitting compensation for expert witnesses testifying in a criminal trial unless the expert is retained for an indigent defendant or for a sanity hearing. See A.R.S. §§ 13-4013, 13-4014; Ariz. R. Crim. P. 15.9.

The doctors rely on A.R.S. § 13-4013(C) as authority for their argument that they should be compensated as expert witnesses. DMG's Motion for Protective Order at 6. That statute permits compensation only for expert witnesses who are (1) appointed by the court for indigent defendants and (2) reasonably necessary to

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duty is a hardship because it may be difficult to rearrange their work schedules to testify at trial.

provide a defense at trial. A.R.S. § 13-4013(C). That does not apply here. The state has called the doctors to testify because they treated the victim. They were not appointed by the court. Accordingly, A.R.S. § 13-4013(C) is not applicable and does not give the trial court the authority to order the state to compensate the doctors for their testimony.

**2. Treating physicians are not entitled to expert witness compensation.**

Even if a statute or rule permitting a court to order fees paid to expert witnesses in a criminal matter existed, a treating physician is not clearly entitled to such compensation. In some jurisdictions, courts have held that a witness with expert qualifications is not entitled to compensation unless he or she testifies solely as an expert. 98 C.J.S. Witnesses §85 (2002).

If he or she is a participant witness or examines, prescribes or treats the person and is called upon to testify upon these matters and in addition thereto is asked to express his or her opinion as to prognosis or other subjects upon which he or she is an expert, he or she is not being called upon to testify solely as an expert and therefore cannot be compensated as an expert.

*Id.*, citing *Bureau of Medical Economics v. Cossette*, 118 Cal. Rptr. 242 (1974).

Thus, even if a statute or procedural rule provided for expert witness compensation in criminal trials, treating physicians called by the state or non-indigent defendants would qualify as a participant witness and would not be entitled to compensation as an expert witness.

**3. The trial court's hybrid witness compensation model is unworkable due to the broad definition of expert witness in Ariz. R. Evid. 702.**

Instead of considering the doctors' request for compensation under the more sensible participant witness structure, the trial court created a hybrid witness compensation scheme without statutory authority. The trial court erroneously accepted DMG's claim that a witness must be treated as an expert witness under Ariz. R. Evid. 702 unless he or she testifies solely as a fact witness. In its ruling, the court ordered the parties to work out payment for the portions of the doctors' testimony that consists of "expert testimony." Minute Entry, April 11, 2011, at 2. The requested expert compensation includes preparation and travel time. DMG's Motion for Protective Order at 10. If permitted to stand, this newly-created hybrid witness will lead to a significant expansion of the type of witnesses entitled to compensation.

Ariz. R. Evid. 702 sets forth broad guidelines by which a witness may qualify as an expert. Although the doctors claim their treatment as experts is limited to professionals like themselves, expert witnesses are not "fixed or limited to any class of persons acting professionally" under Rule 702. *Bliss v. Treece*, 134 Ariz. 516, 519, 658 P.2d 169, 172 (1983). "An expert may be qualified to testify on the basis of actual experience or careful study." *Lay v. City of Mesa*, 168 Ariz. 552, 554, 815 P.2d 921, 923 (App. 1991).

Under the trial court's ruling, any witness called primarily to testify about his or her participation in, or observations of, the actions leading to the criminal charge would be entitled to compensation as an expert if they are asked a single question within an area of the witness' specialized knowledge. For example, this would allow "expert" compensation for a math teacher who witnesses a shooting if he testifies that he recognized the weapon based on his experience as a hunter or recreational shooter. If permitted to stand, the trial court's newly-created rule would allow compensation for an unlimited number of participant witnesses in criminal trials.

Moreover, it would lead to litigation over who bears the burden of the expense. In this example, it is unclear who would be required to pay the math teacher for his expert testimony if the party who called the teacher differs from the party that elicited the expert testimony or if the testimony resulted from a juror question. The trial court's decision thus creates a system that is ultimately unworkable as well as contrary to explicit legislative authority.

Because no Arizona constitutional or statutory provision exists that permits witness compensation for expert or non-indigent fact witnesses in a criminal trial, the trial court did not have the authority to order the state to pay such compensation to a treating physician or other participant witnesses. Thus, the court

erred in granting the doctors' motion and creating a hybrid witness entitled to payment for his or her preparation for, travel to, and attendance at trial.

### **III. CONCLUSION**

APAAC respectfully urges this Court to accept jurisdiction of the State's Petition for Special Action and grant relief. The unauthorized expansion of the witness compensation statute will have a significant and wide-ranging impact on the criminal justice system, leading to a waste of prosecutorial resources for the compensation of fact witnesses that has no authority in state law.

RESPECTFULLY SUBMITTED this \_\_ day of May, 2011.

By: \_\_\_\_\_  
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## **CERTIFICATE OF SERVICE**

The original and seven copies of APAAC's *Amicus Curiae* Brief were delivered to for filing with the Clerk of the Arizona Court of Appeals on May \_\_, 2011. A conformed copy of APAAC's *Amicus Curiae* Brief was served on:

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DATED this \_\_ day of May, 2011.

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## **CERTIFICATE OF COMPLIANCE**

Under Rule 6(c) and Rule 23(c) of the Arizona Rules of Civil Appellate Procedure, I certify that the attached Brief uses proportionately spaced type of 14 points or more, is double-spaced using a roman font, and contains less than 10,500 words.

DATED this \_\_ day of May, 2011.

By: \_\_\_\_\_  
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